

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

**PLAINTIFF COMMONWEALTH
OF PENNSYLVANIA'S MOTION
FOR RECONSIDERATION**

NOTE ON MOTION CALENDAR:
October 15, 2024

Pursuant to Fed. R. Civ. P. 54(b) and LCR 7(h), Plaintiff Commonwealth of Pennsylvania (the “Commonwealth”) hereby respectfully requests that this Court reconsider part of its September 30, 2024 Order granting in part and denying in part Defendant’s Motion to Dismiss the Amended Complaint (Dkt. #289) (the “Decision”). The Commonwealth respectfully contends that the portion of the Court's Decision dismissing Count XVIII of the Amended Complaint misapprehends Pennsylvania state law and overlooks allegations which support the Commonwealth’s Pennsylvania Unfair Trade Practices and Consumer Protection Law (“PUTPCPL”) claims. Accordingly, the Commonwealth requests that the Court reconsider its Decision and issue an order reinstating the PUTPCPL claims for unfairness and failure to disclose a material fact that were dismissed by the Court.

The Pennsylvania Attorney General enforces the PUTPCPL and pled qualifying conduct in the Commonwealth’s claims in the Amended Complaint (Dkt. #170). Specifically, in Count XVIII, a failure to disclose a material fact is qualifying conduct in stating a violation of Section 3 of the PUTPCPL. The Commonwealth pled that, “Amazon deceptively concealed from . . . consumers as to the actual characteristics of the marketplace being other than competitive and fair.” Am. Compl. ¶ 545. Controlling Pennsylvania precedent in *Anadarko Petroleum Corp. v. Commonwealth*, 206 A.3d 51, 61 (Pa. Commw. 2019), *aff’d in part, rev’d in part on other grounds sub nom. Commonwealth v. Chesapeake Energy Corp.*, 665 Pa. 2, 247 A.3d 934 (Pa. 2021), holds that a failure to disclose anticompetitive conduct is actionable under the PUTPCPL.

In the Decision, this Court’s analysis of the PUTPCPL cited only one section of the *Anadarko* holding, where the court found that Count III of the complaint in that case did not state a claim because it did not allege that the relevant conduct came within any of the 21 statutory definitions of unfair methods of competition and unfair or deceptive acts or practices. Decision at 36:18-37:1 (quoting *Anadarko*, 206 A.3d at 60). However, the *Anadarko* court on the next

1 page of its opinion held that Count IV in that case stated a “UTPCPL-based antitrust claim”
2 because Count IV did allege conduct coming within the ambit of the PUTPCPL. *Anadarko*, 206
3 A.3d at 61. That conduct was the failure to disclose the true characteristics of the marketplace
4 and challenged agreements being other than “competitive and fair.” *Id.*

5 Pennsylvania’s claim here similarly alleges an actionable failure to disclose material
6 information about Amazon’s consumer-focused conduct. Specifically, the Amended Complaint
7 contains allegations that Defendant Amazon.com, Inc. (“Amazon”) failed to disclose a material
8 fact in relation to the characteristics of the marketplace—that Amazon was using the Nessie
9 pricing algorithm to increase prices and strategically turning it on and off at will to avoid
10 consumers from catching on and to escape regulatory scrutiny. Am. Compl. ¶¶ 419, 421, 428-31,
11 432.¹ Indeed, the Court cited these allegations when it denied the motion to dismiss as to Count
12 IV, the Federal Trade Commission’s (“FTC”) challenge to Amazon’s Nessie pricing system.
13 Decision at 25:1-7, 27:4-11, 27:12-14. Accordingly, the Commonwealth did not merely plead
14 anticompetitive conduct in the absence of qualifying conduct; but rather, the Commonwealth
15 pled Amazon failed to disclose a material fact in relation to the characteristics of the
16 marketplace—qualifying conduct in accord with the *Anadarko* decision. *Anadarko*, 206 A.3d at
17 61.

18 The preceding analysis from this Court’s Decision applies equally to the
19 Commonwealth’s PUTPCPL claims through the allegations in Paragraphs 533 (unfairness) and
20 545 (deceptive concealment) of the Amended Complaint. In relevant part, the Commonwealth
21 pled that “Amazon’s conduct has been otherwise unfair or unconscionable because they offend
22 public policy as established by statutes” Am. Compl. ¶ 533. Since the Decision found that
23

24 ¹ These allegations were incorporated into the Commonwealth’s PUTPCPL claim. Am. Compl. ¶¶ 529, 532, 543.

Count IV stated a claim under Section 5 of the FTC Act as a method of unfair competition, Count XVIII under the PUTPCPL should as well. Controlling Pennsylvania precedent in *Ash v. Cont'l Ins. Co.*, 932 A.2d 877, 881–82 (Pa. 2007) holds that a violation of another consumer protection statute *in pari materia* with the PUTPCPL is actionable under the PUTPCPL.

Both the FTC Act and the PUTPCPL broadly prohibit “unfair methods of competition and unfair or deceptive acts or practices.” 73 P.S. § 201–3; 15 U.S.C § 45 (a)(1) (same). “Indeed, in all relevant respects the language of section 3 of the Consumer Protection Law and section 5 of the FTC Act is identical.” *Com., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 818 (Pa. 1974). Here, with respect to the specific concealing conduct discussed *supra* and in the Decision at 27:4-11, the FTC Act and the PUTPCPL both encompass this type of conduct and, as a result, are statutes *in pari materia*. As such, courts may look to the decisions under the FTC Act for guidance and interpretation. *Id.* Thus, a claim that states an unfair method of competition involving concealing conduct under the FTC Act should also state a claim under the PUTPCPL.

Based on the foregoing, the Commonwealth respectfully requests the Court reconsider its Decision dismissing the Commonwealth’s PUTPCPL claims relating to unfairness and failure to disclose a material fact in Count XVIII and reinstate the count and those claims.

Dated: October 15, 2024

Respectfully submitted,

MICHELLE A. HENRY
Attorney General of Pennsylvania

s/Tracy W. Wertz
Tracy W. Wertz (admitted *pro hac vice*)
Chief Deputy Attorney General

s/Jennifer A. Thomson
Jennifer A. Thomson (admitted *pro hac vice*)

1 Senior Deputy Attorney General

2 s/Brandon S. Sprecher

3 Brandon S. Sprecher (admitted *pro hac vice*)

4 Deputy Attorney General

5 Pennsylvania Office of Attorney General

6 Strawberry Square, 14th Floor

7 Harrisburg, PA 17120

8 Telephone: (717) 787-4530

9 Email: twertz@attorneygeneral.gov

jthomson@attorneygeneral.gov

bsprecher@attorneygeneral.gov

10 *Attorneys for Plaintiff Commonwealth of*
11 *Pennsylvania*

12 ELLEN F. ROSENBLUM

13 Attorney General of Oregon

14 s/ Timothy D. Smith

15 Timothy D. Smith, WSBA No. 44583

16 Senior Assistant Attorney General

17 Antitrust and False Claims Unit

18 Oregon Department of Justice

19 100 SW Market St

20 Portland, OR 97201

21 Telephone: (503) 934-4400

22 Email: tim.smith@doj.state.or.us

23 *Local Counsel for Plaintiff Commonwealth of*
24 *Pennsylvania*